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Capital and Capitalistic Organization

Express Trusts under the Common Law. By ALFRED D. CHANDLER. (Boston: Little, Brown and Company. 1912. Pp. 35. $1.25.)

This title is given to two papers submitted by Mr. Chandler to the Tax Commissioner of Massachusetts conducting an investigation under chapter 55 of the *Resolves of 1911* requiring a report on "Voluntary Associations." The first paper was dated November 20, the second, December 6, 1911. The Tax Commissioner, upon January 17, 1912, made his report (*House Document*, No. 1646) recommending the passage of five acts of which the legislature enacted but one (*Laws 1912*, ch. 595) authorizing realty corporations. In lieu of the other four bills the legislature adopted a further resolve (ch. 113, May 21, 1912) providing for a second investigation. The scope of this resolve seems to have been studiously circumscribed, for it was to concern only holdings of stocks of so-called public service corporations as distinguished from ordinary business or industrial enterprises. The commission, under this second resolve, held public hearings at which again Mr. Chandler appeared (October 24, November 21, 1912) and made extended arguments. These later expositions of the law concerning express trusts are so illuminating and interesting that it is to be hoped that they may be included in a subsequent and comprehensive treatise which, by his long experience and his intimate knowledge of this particular branch of the law, Mr. Chandler is specially qualified to produce. The second commission submitted its report (*House* No. 1788), upon January 4, 1913, recommending five bills of which the legislature accepted more or less completely four as to matters of detail concerning particularly voluntary association holdings of stock in public service corporations (chs. 454, 499, 509, and 596), but rejected the fifth, which was intended to limit the amount of such holdings.

Having thus modified the proposals of legislation in Massachu-

setts adverse to his favorite device of Express Trusts, it is quite natural that Mr. Chandler should have directed his attention to the condition of the law concerning so-called Voluntary Associations, or, as he prefers to term them, Express Trusts under the Common Law, as distinguished from partnerships and as contrasted with corporations. His references generally are to the decided cases, principally in the courts of Massachusetts, though in his later argument he refers with just appreciation to the excellent work of Mr. John H. Sears upon *Trust Estates as Business Companies* (St. Louis: Counselor's Publishing Company, 1912); and he mentions the admirable article by Richard W. Hale, published in the *Commercial and Financial Chronicle* of New York, August 16, 1902, pp. 314-317, which should be consulted for its full and accurate statement of the history, the characteristics, and the advantages of the Express Trust. Mr. Chandler does not refer, and for his present purpose he has no need to refer, to the acute and lively discussion of Professor Maitland, in his introduction to the translation of that portion of the treatise of Otto Gierke, which he entitled *Political Theories of the Middle Ages.* In this introduction, Sinibaldi Fieschi (Pope Innocent IV) is credited with having originated the ascription of artificial entity to the corporation, a category too confined for the practical, hard-headed Englishman. This is described graphically by Professor Maitland:

> For the last four centuries Englishmen have been able to say "Allow us our Trusts, and the law and theory of corporations may indeed be important, but it will not prevent us from forming and maintaining permanent groups of the most various kinds; groups that behind a screen of trustees will live happily enough, even from century to century, glorying in their unincorporatedness. If Pope Innocent and Roman forces guard the front stairs, we shall walk up the back." Behind the screen of trustees, and concealed from the direct scrutiny of legal theories, all manner of groups can flourish: Lincoln's Inn, or Lloyds, or the Stock Exchange, or the Jockey Club, a whole presbyterian system, or even the Church of Rome with the Pope at its head.

This accords with the view of Mr. Chandler, who says in substance:

> Express Trusts have been in successful operation in Great Britain and America for generations and applied wisely in both hemispheres to property valued at hundreds of millions of dollars; are based upon personal responsibility and efficiency, and when properly drawn avoid no legal obligation; much less do they evade any. They avoid needless business obstacles; they require no arbitrary fixed capitalization; they can dispense with the deceptive fiction of a par value; they pro-

mote sound administration; they stimulate mercantile intercourse; and they secure a higher standard of efficiency through active Trustees than is generally attained through the usual perfunctory, often irresponsible, dummy corporate directors who fail to direct, and who, when called to account in court, are admonished that the high criterion of a trusteeship should be their canon of conduct, rather than that of a shifty directorate.

If Mr. Chandler is correct (which we do not now question) in this estimate of the superior advantages of group organization under the trust form, then upon these grounds alone he is justified in his strong and continued advocacy for its general adoption. But, going further, he indicates other reasons for preferring the trust. Among these are the constitutional protection of the Trustees as citizens in the fullest sense, which corporations are not, and immunity from unequal taxation (*Gleason* v. *McKay*, 134 Mass. 419), from the federal corporation tax (*Eliot* v. *Freeman*, 220 U. S. 178) and from prurient curiosity. The Trustee also may be freed from personal liability for any obligation which by express agreement is to be payable exclusively from the Trust Estate (*Bank of Topeka* v. *Eaton*, 100 Fed. 8; 107 Fed. 1003). When the estate and the exclusive power to incur obligations are properly vested in the Trustees the beneficiaries also are free from personal liability for the contracts of the Trustees.

The Express Trusts, says Mr. Chandler, put the legal estate entirely in one or more Trustees, who are not agents but principals, having the full title and control, while others have a beneficial interest in and out of the same, but are neither partners nor agents. This is the view now taken by the supreme judicial court of Massachusetts, as indicated in the recent case of *Ashley* v. *Winkley* (209 Mass. 509) in accord with the notable English case of *Smith* v. *Anderson* (15 E. L. R. Ch. D. 247), though in several earlier cases the Massachusetts court had seemed inclined to include these Trusts with associations of very different class, under the head of partnerships (*Phillips* v. *Blatchford*, 137 Mass. 510).

Voluntary Associations have come before the courts recently in Illinois (*Venner* v. *Chicago City Ry.*, 101 N. E. 949) and in New York, where they have been regarded either as quasi-corporations (*Hibbs* v. *Brown*, 190 N. Y. 167) or as partnerships (*Matter of Wilmer*, 153 App. Div. 804-806; *Spraker* v. *Platt*, 158 App. Div. 377).

But however such voluntary associations are to be regarded as to their legal characteristics, their practical utility has been vin-

dicated by centuries of experience under conditions widely varying and they deserve most respectful consideration. Mr. Chandler is entitled to thanks for this plea in behalf of the Express Trusts and for that more comprehensive discussion which it is to be hoped he is yet able to publish.

FRANCIS LYNDE STETSON.

Die Konzentration im Seeschiffahrtsgewerbe. By PAUL LENZ. (Jena: Gustav Fischer. 1913. Pp. viii, 142. 4 M.)

An attempt is made in this doctor's thesis to explain and justify the modern tendency to combination among ocean carriers, whether manifesting itself in actual fusion of competing lines, or in more or less tight conferences—agreements to fix rates jointly, divide pooled earnings, or divide territory served.

The elimination of competition among carriers becomes necessary and justifiable in proportion as these carriers represent larger and larger units of specialized capital investments which can neither be withdrawn nor used in any other route than the competitive one. The railroad is the prime example of such a carrier. No one longer thinks that competition in rates among rail carriers is desirable. It has been eliminated either by government ownership of railroads, or, under private ownership, by the making of common rates by all carriers, under government sanction.

Certain ocean trade routes approach this railroad standard. Lines in the North Atlantic trade run "as if on invisible rails." Competition between them cannot result in the elimination from this route of surplus tonnage—as competition among tramps does—and its withdrawal to another market, thus reducing the supply and raising to a profitable basis the rate for ship room. The Atlantic liners must all stay in this trade; no other routes have the passengers to support them. So they combine and fix minimum passenger rates. They are safe in fixing rates that yield a good profit, for no vessels exist that could attract passengers away from those of the combining lines. Besides fixing the rates for cabin passengers, these lines pool the proceeds of the European emigrant business. They fix uniform freight rates westbound, applying on the high-class tonnage of European exports. Eastbound, the liners must be left comparatively free to meet the competition of the tramp steamers for bulky American exports. But the Liverpool conference, for instance, fixes the eastbound